Clariant Masterbatches (M) Sdn Bhd v Prestige Dynamics Industries Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-70–06 OF 2017(P)
AHMAD MAAROP CJ (MALAYA), RAMLY ALI, AZAHAR MOHAMED, ZAHARAH IBRAHIM AND JEFFREY TAN FCJJ
10 APRIL 2019

Sale of Goods — Conditions and warranties — Breach of condition — Buyer specified in purchase order ('PO') that goods supplied should be free of hazardous substances — Seller supplied goods in breach of that condition — Buyer accepted goods without protest and paid for them and did not do any tests to determine if they contained hazardous substances — Whether since property in goods passed to buyer the breach of condition had to be treated as breach of warranty under s 13 of the Sale of Goods Act 1957 ('the SGA') — Whether buyer entitled to claim for damages against seller under s 59 of the SGA — Whether seller knew buyer used its product to make goods for sale to third parties — Whether seller liable to pay damages that buyer had to pay third parties as a result of the defect in its goods caused by seller's breach of the condition — Whether the damages seller had to pay was reasonably foreseeable and a direct result of the breach — Contracts Act 1950 s 74

The appellant ('Clariant') was in the business of making and supplying masterbatches (additives used to add colour and functionality to plastics). The respondent ('Prestige') made and sold moulded plastic products and used masterbatches in its manufacturing process. Between 2004 and 2007, Prestige took regular supplies of a particular description of masterbatch ('the product') from Clariant which contained heavy metals, a hazardous substance. However, in August 2007, when Prestige placed an order ('the PO') for the same product again, it attached a note to its PO requiring the product to be free from any hazardous substance and Clariant was to attach to each of its deliveries a certificate of analysis ('CA') and test report which ruled out the presence of hazardous substances. Pursuant to the PO, Clariant made four deliveries of the product to Prestige between November 2007 and March 2008 without attaching any test report to the said deliveries. Prestige accepted all the deliveries without protest and paid for them without insisting on the test report and, although it had ample opportunity to do so, it did not carry out any tests on the product to ensure they did not contain any hazardous substance. Prestige had used the product to make plastic parts for a power tools supplier ('RBSB') who, in turn, had sent its products to overseas affiliates for distribution and sale. When a Swedish chemical agency discovered that a plastic part (made by Prestige) of a tool sold by RBSB's affiliate contained a chemical that breached European Union standards and regulations. RBSB

immediately withdrew distribution of that item and claimed damages against Prestige for breach of contract. Prestige paid RM3,196,841.71 in compensation to RBSB in settlement of their dispute and sued Clariant for the said sum for breaching the express condition it had stated in its PO. The High Court dismissed Prestige's claim holding that despite knowing, from its previous course of dealings with Clariant, that the product contained hazardous substances, Prestige had accepted delivery of the product on four separate occasions between November 2007 and March 2008 and paid for them without inspecting the product or insisting on a test report from Clariant. On appeal, the Court of Appeal ('COA') set aside the decision and allowed Prestige's claim, holding that since the presence of hazardous substances could only be confirmed by a test report and since none was ever furnished by Clariant, it could not be said that Prestige had waived the condition that the product should not contain hazardous substances. Clariant was granted leave to file the instant appeal against the COA's decision.

Held, unanimously dismissing the appeal and affirming the COA's decision:

(1) The contract for the sale and purchase of the product clearly fell within s 4(1) of the Sale of Goods Act 1957 ('the SGA') as it was a contract under which Clariant agreed to transfer the property in the product to Prestige for a price. The sale pursuant to the PO was a sale by description within the meaning of s 15 of the SGA. In this case, the thing that was bought was the colourant identified as PAJ4A741GM RED. It was further described as a product which should not contain any hazardous substance. There was therefore the implied condition that the product to be supplied under the PO should comply with that description. Clariant accepted the PO with the stipulated condition that the said colourant should not contain any hazardous substance (see paras 60–61, 63 & 65).

(2) If, as argued by Clariant, the said colourant had, of necessity, to contain the hazardous substance in order to produce the desired colour, then Clariant should not have accepted the order under the PO. Since Clariant had accepted the PO, Prestige was entitled to assume that the said colourant could be produced without any hazardous substance (see para 66).

(3) The reliance on the fact that Prestige had accepted 14 previous deliveries of PAJ4A741GM RED pursuant previous POs was misconceived as those POs did not contain the condition that the product ordered had to be free of hazardous substances. There was no doubt that what was delivered by Clariant failed to meet that condition. There was a clear breach of that condition in the PO (see paras 67–68).

(4) There was no question that the property in the product had passed to Prestige. It had accepted the deliveries from Clariant without insisting on a test report; it had paid for the goods and not carried out any test on the

delivered products although it had ample time to do so. The breach of the condition stated in the PO had to be treated as a breach of warranty under s 13 of the SGA. Section 59 of the SGA allowed a buyer to sue for damages for breach of warranty. Prestige was 'compelled' by s 13 to treat the breach by Clariant as a breach of warranty and it was entitled to sue for damages (see paras 69–75 & 78–80).

(5) Section 74 of the Contracts Act 1950 applied to contracts for the sale of goods by virtue of s 3 of the SGA in so far as it was not inconsistent with the express provisions of the SGA. There was nothing to negate the oral and documentary evidence that Prestige had paid RBSB RM3,196,841.71 as compensation. Clariant knew that the product would be used in the plastic parts produced by Prestige and that those parts would be supplied to third parties to be incorporated in products produced by them. Clariant was surely aware that if a breach of the condition of its contract with Prestige caused a loss to Prestige, it would also, in the usual course of things, naturally cause a loss to the third parties. In this case, the third party was RBSB. In the circumstances, the COA was right in holding that Prestige had proven its claim against Clariant (see paras 83, 85, 92 & 95).

[Bahasa Malaysia summary

Perayu ('Clariant') adalah dalam perniagaan membuat dan membekalkan *masterbatch* (bahan tambahan yang digunakan untuk menambah warna dan fungsi kepada plastik). Responden ('Prestige') membuat dan menjual produk plastik acuan dan menggunakan masterbatch dalam proses pembuatannya. Antara 2004 dan 2007, Prestige telah mengambil bekalan secara tetap jenis khusus masterbatch ('produk') daripada Clariant yang mengandungi logam berat, satu bahan berbahaya. Walau bagaimanapun, pada Ogos 2007, apabila Prestige meletakkan pesanan ('PO') untuk produk yang sama sekali lagi, ia melampirkan nota kepada PO yang menghendaki produk itu bebas daripada sebarang bahan berbahaya dan Clariant akan melampirkan kepada setiap penghantarannya sijil analisis ('SA') dan laporan ujian yang menolak kehadiran bahan berbahaya. Menurut PO, Clariant membuat empat penghantaran produk untuk Prestige antara November 2007 dan Mac 2008 tanpa melampirkan apa-apa laporan ujian kepada penghantaran tersebut. Prestige menerima semua penghantaran tanpa protes dan membayar kepada mereka tanpa menuntut laporan ujian dan, walaupun ia mempunyai banyak peluang untuk berbuat demikian, ia tidak menjalankan sebarang ujian ke atas produk itu untuk memastikan mereka tidak mengandungi sebarang bahan berbahaya. Prestige telah menggunakan produk ini untuk membuat bahagian-bahagian plastik untuk pembekal alat kuasa ('RBSB') yang seterusnya telah menghantar produknya ke sekutu luar negara untuk pengedaran dan penjualan. Apabila sebuah agensi kimia Sweden mendapati bahawa sebahagian plastik (dibuat oleh Prestige) alat yang dijual oleh sekutu RBSB mengandungi bahan kimia

yang melanggar piawaian dan peraturan Kesatuan Eropah. RBSB dengan serta-merta menarik pengedaran item tersebut dan menuntut ganti rugi terhadap Prestige kerana melanggar kontrak. Prestige membayar RM3,196,841.71 sebagai ganti rugi kepada RBSB dalam menyelesaikan pertikaian mereka dan menyaman Clariant untuk jumlah tersebut kerana melanggar syarat nyata yang telah dinyatakan dalam POnya. Mahkamah Tinggi menolak tuntutan Prestige memutuskan walaupun mengetahui, daripada urusannya yang dahulu dengan Clariant, bahawa produk itu mengandungi bahan berbahaya, Prestige telah menerima penghantaran produk tersebut dalam empat kali kejadian berasingan antara November 2007 dan Mac 2008 dan membayarnya tanpa memeriksa produk atau menuntut laporan ujian daripada Clariant. Atas rayuan, Mahkamah Rayuan ('MR') mengetepikan keputusan itu dan membenarkan tuntutan Prestige, memutuskan bahawa oleh kerana kehadiran bahan-bahan berbahaya hanya dapat disahkan oleh laporan ujian dan oleh kerana tidak pernah diberikan oleh Clariant, ia tidak boleh dinyatakan bahawa Prestige telah mengetepikan syarat bahawa produk tersebut tidak seharusnya mengandungi bahan berbahaya. Clariant telah diberi kebenaran untuk memfailkan rayuan ini terhadap keputusan MR.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan MR:

(1) Kontrak bagi penjualan dan pembelian produk tersebut jelas terangkum dalam s 4(1) Akta Jualan Barangan 1957 ('Akta') kerana ia merupakan kontrak di mana Clariant bersetuju untuk memindahkan harta dalam produk kepada Prestige untuk satu harga. Jualan menurut PO adalah jualan dengan keterangan dalam erti s 15 Akta. Dalam kes ini, perkara yang dibeli adalah warna yang dikenali sebagai PAJ4A741GM RED. Ia digambarkan sebagai produk yang tidak mengandungi sebarang bahan berbahaya. Oleh itu, syarat tersirat bahawa produk yang dibekalkan di bawah PO hendaklah mematuhi gambaran tersebut. Clariant menerima PO dengan syarat yang ditetapkan bahawa pewarna tersebut tidak boleh mengandungi sebarang bahan berbahaya (lihat perenggan 60–61, 63 & 65).

(2) Jika, sebagaimana yang diperkatakan oleh Clariant, pewarna tersebut mempunyai, keperluan, untuk mengandungi bahan berbahaya untuk menghasilkan warna yang dikehendaki, maka Clariant tidak sepatutnya menerima pesanan di bawah PO. Oleh kerana Clariant telah menerima PO, Prestige berhak untuk mengandaikan bahawa pewarna tersebut boleh dihasilkan tanpa bahan berbahaya (lihat perenggan 66).

(3) Kebergantungan pada hakikat bahawa Prestige telah menerima 14 penghantaran sebelumnya PAJ4A741GM RED berdasarkan PO sebelumnya telah salah tafsir kerana PO itu tidak mengandungi syarat bahawa produk yang diperintahkan harus bebas dari bahan berbahaya.

A Tiada keraguan lagi bahawa apa yang disampaikan oleh Clariant gagal memenuhi syarat tersebut. Terdapat pelanggaran yang jelas dalam syarat di PO (lihat perenggan 67–68).

(4) Tiada persoalan bahawa harta dalam produk telah diserahkan kepada
B Prestige. Ia telah menerima penghantaran daripada Clariant tanpa menuntut laporan ujian; ia telah membayar untuk barang-barang dan tidak melakukan apa-apa ujian mengenai produk yang dihantar walaupun ia mempunyai masa yang mencukupi untuk berbuat demikian. Pelanggaran syarat yang dinyatakan dalam PO harus dianggap
C sebagai pelanggaran jaminan di bawah s 13 Akta. Seksyen 59 Akta membenarkan pembeli menuntut ganti rugi kerana melanggar jaminan. Prestige telah 'terikat' oleh s 13 untuk mengubati pelanggaran oleh Clariant sebagai pelanggaran jaminan dan ia berhak menuntut ganti rugi (lihat perenggan 69–75 & 78–80).

D

(5) Seksyen 74 Akta Kontrak 1950 terpakai kepada kontrak untuk penjualan barang menurut s 3 Akta setakat yang tidak bertentangan dengan peruntukan nyata Akta. Tiada apa-apa untuk membantah bukti lisan dan dokumentari bahawa Prestige telah membayar RBSB RM3,196,841.71
E sebagai pampasan. Clariant tahu bahawa produk tersebut akan digunakan dalam bahagian plastik yang dihasilkan oleh Prestige dan bahawa bahagian-bahagian tersebut akan dibekalkan kepada pihak ketiga untuk dimasukkan ke dalam produk yang dihasilkan oleh mereka. Clariant pasti sedar bahawa jika pelanggaran syarat kontrak dengan
F Prestige menyebabkan kerugian kepada Prestige, ia juga akan, dalam hal biasa perkara, secara semula jadi menyebabkan kerugian kepada pihak ketiga. Dalam kes ini, pihak ketiga ialah RBSB. Dalam keadaan ini, MR adalah betul dalam memutuskan bahawa Prestige telah membuktikan tuntutannya terhadap Clariant (lihat perenggan 83, 85, 92 & 95).]

G

Notes

For cases on breach of condition, see 11(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 728–729.

H **Cases referred to**

Grant v Australia Knitting Mills Ltd and Others [1936] AC 85, PC (refd)

Legislation referred to

I Contracts Act 1950 s 74
Courts of Judicature Act 1964 s 78
Sale of Goods Act 1893 [UK] s 53(2)
Sale of Goods Act 1957 ss 3, 4(1), 13, 15, 59

Ng Sai Yeang (Teoh Chye Yi with her) (Raja Darryl & Loh) for the appellant.

Cyrus Das (Karin Lim Ai Ching and Suppiah a/l Arumugam with him) (Pregrave & Matthews) for the respondent.

Zaharah Ibrahim FCJ:

INTRODUCTION

[1] This is an appeal by Clariant Masterbatches (M) Sdn Bhd, ('Clariant') who was the defendant in the High Court, against the decision of the Court of Appeal which allowed the appeal by Prestige Dynamics Industries Sdn Bhd, ('Prestige') who was the plaintiff in the High Court, against the decision of the High Court dismissing with costs the plaintiff's claim.

BACKGROUND FACTS

[2] Clariant produces and supplies masterbatches. These are colour concentrates or colourants made from specific ratios of additives which, when mixed, will produce a specific colour.

[3] Sometime in 2003, Clariant gave samples to Prestige.

[4] Clariant also gave to Prestige presentation cards or laboratory references containing technical information such as heat stability, light fastness, food contact suitability and presence of heavy metal pigments ('HMP').

[5] Prestige is a moulder who incorporates the masterbatches into its plastic products in accordance with the colour which its customers want.

[6] From the samples, Prestige chose the product 'PAJ4A741GM RED' ('product'). The product contains HMP which is a hazardous substance and produces a specific shade of red in the plastic products to be moulded.

[7] On 3 November 2004, Prestige placed its first order for the product.

[8] Between 2004 and 2007, Prestige placed 14 orders for the product.

[9] At all times, in all 14 of the purchase orders Prestige stated the description 'PAJ4A741GM RED'.

[10] In all instances, Clariant delivered the Product with the exact specifications of 'PAJ4A741GM RED' as contained in the samples and the laboratory references, which contained HMP.

A **[11]** On 7 August 2007, Prestige again ordered the product, and for the first time stated in a note ('note') in the purchase order ('subject PO') the following:

> Please attach COA and Test Report for Hazardous Substance with every delivery
>
> Please take note no hazardous substance allow in all product and packaging supplier to PDI [sic]

B

[12] The subject PO also contained the the following words:

> The undersigned hereby acknowledge and accept this order in term accordance to the condition stipulated above.

C

[13] Clariant's customer service accepted the order in the subject PO on 17 August 2007.

D **[14]** Clariant delivered the product specified in the subject PO to Prestige in four separate consignments on 14 November 2007, 5 January 2008, 1 February 2008 and 1 March 2008 and sent them with the delivery orders and invoices.

E **[15]** Upon receiving the product, prestige stamped on the delivery notes the following statement:

> RECEIPT DOES NOT CONSTITUTE ACCEPTANCE
>
> TO BE SUBJECTED TO INCOMING INSPECTION APPROVAL

F

[16] Prestige claimed to have used the product supplied under the subject PO in its business by incorporating it into the plastic parts which it made for Robert Bosch Power Tools Sdn Bhd ('RBSB').

G

[17] Prestige paid Clariant a total sum of RM3,980 in four payments, on 29 February 2008, 10 April 2008, 10 May 2008 and 10 June 2008.

[18] On 15 October 2007, the Swedish Chemical Agency inspected a tool H sold by Robert Bosch AB ('RBAB') and found that a plastic part component of the tool contained a chemical which was in breach of the European Union 'EU Directive 2002/95/EC' ('EU directive') which had been in force since 2006.

[19] The plastic part component of the tool which contained the chemical in I breach of the EU directive was supplied to RBAB by RBSB. That plastic part was supplied by Prestige and incorporated the colourant 'PAJ4A741GM RED' which had been supplied by Clariant to Prestige.

[20] RBSB took action to halt usage of the part containing the colourant

PAJ4A741GM RED which had been supplied to it by Prestige, and took action to rework items which had already been manufactured and having the plastic parts containing the colourant.

[21] RBSB then claimed damages against Prestige for breach of the latter's contract with RBSB.

[22] Prestige negotiated with RBSB and paid RBSB a sum of RM3,196,841.71 ('compensation sum').

[23] Prestige then claimed against Clariant for damages as a result of Clariant's breach of the condition as expressed in the note in the subject PO.

[24] Prestige filed this action against Clariant, seeking damages of RM3,196,841.71, interest and costs.

AT THE HIGH COURT

[25] At the High Court, Clariant contended that like the 14 previous purchase orders, the subject PO was for the product 'PAJ4A741GM RED' (with contained HMP). Clariant delivered the product under the subject PO in exact conformity with the samples provided and identical with the 14 previous purchase orders. Clariant had provided only the certificate of analysis and not a test report.

[26] Clariant contended that even if the cause of Prestige's breach to RBSB under the its contract with RBSB was due to the HMP in the product which was incorporated into plastic part for RBSB, Clariant did not breach the contract in the subject PO.

[27] Clariant further contended that it was also not liable for Prestige's alleged loss in the form of the compensation sum which Prestige paid to RBSB, which sum had nothing to do with Clariant.

[28] According to Clariant, the fact that the product contained HMP was within the respondent's knowledge. It supplied the product before and after the EU directive came into force and also under the subject PO in exact conformity with the samples provided and description attributed to the product. Prestige accepted the product and made full payment without any objection.

[29] Clariant said that it was not a party to Prestige's contract with RBSB and was not even aware of the terms of the contract. Neither Prestige nor RBSB had disclosed the terms to Clariant. Thus, it was not bound by RBSB's specific

A requirement for compliance with the EU directive even if it was provided for in that contract. It merely supplied the product and had no knowledge of the product being incorporated into any specific part or that the part would be sold in Europe. In 2003, Clariant only knew that Prestige used the product for 'Bosch' without any further details.

B

[30] It was only in March 2008, after Clariant had delivered the last consignment of the product that Prestige asked Clariant to give information on the product relating to HMP and later suggested that Clariant had breached the subject PO.

C

[31] Despite the request for information on the product relating to HMP, Prestige made three payments to Clariant: in April, May and June 2008.

D **[32]** Clariant's position was that while it agreed that the product contained HMP, its contractual obligations were fulfilled when the product was delivered and accepted by Prestige. There was no basis for any claim to be made against Clariant.

E **[33]** At the conclusion of the full hearing, the High Court dismissed Prestige's claim with costs.

[34] The High Court held that as of 2003 Prestige knew the product contained HMP. Between November 2007 and March 2008, Prestige accepted delivery of the product on four separate occasions. Prestige was accorded reasonable opportunity to inspect and examine the product. Prestige never asked for nor insisted on the test report. Between February 2008 and June 2008, Prestige did not reject the product but instead accepted them and paid for them on four different occasions.

F

G

[35] Prestige appealed against the decision to the Court of Appeal.

AT THE COURT OF APPEAL

H

[36] The Court of Appeal, after hearing the parties, allowed Prestiges's appeal and set aside the judgement of the High Court.

[37] The Court of Appeal held that the existence of hazardous substance in the product could only be confirmed by a test report. In the absence of such test report, it could not be said that Prestige had waived the condition that there be no hazardous substance in the product. The Court of Appeal allowed the sum of RM3,196,841.71 claimed by Prestige as damages, being the compensation sum paid to RBSB.

I

AT THE FEDERAL COURT

Leave question

[38] Clariant applied to this court for leave to appeal against the decision of the Court of Appeal. On 1 June 2017, leave was granted.

[39] The question of law ('leave question') for which leave was granted is:

> Whether a buyer of goods having made payment and having waived any alleged breach of contract by the seller, is able to recover damages for any further and/or consequential loss arising out of the buyer's own liability to a third party, which loss did not naturally arise in the usual course of the seller selling the goods.

SUBMISSIONS

Submissions by Clariant

[40] Clariant submitted that Prestiges's main witness, PW1, agreed that as with all 14 previous purchase orders, by specifying the description of the product, the expectation was to get the same colourant which would correspond with the sample and specifications stated in the laboratory references. PW1 also agreed that the colourant attributed to the product was of paramount importance in Prestige's manufacturing process to produce the exact shade of red that RBSB requested.

[41] Clariant submitted that at all times Prestige knew the product they wanted for their client and placed reliance on the description stated in the samples and laboratory references and this was still the case when Prestige placed its order under the subject PO.

[42] Prestige used the description 'PAJ4A741GM RED' in identifying the product it wanted to be supplied to it and Clariant supplied the product matching the description 'PAJ4A741GM RED'.

[43] The statement in the note that no hazardous substance was allowed would mean different chemical elements needed to be added or removed and would result in a masterbatch having a shade of red that is not the same as 'PAJ4A741GM RED'.

[44] Prestige retained the product for months and never intimated any rejection to Clariant and never insisted on being provided with a test report before accepting the product and making payment.

[45] By its conduct, Prestige, according to Clariant, had waived the requirement for a test report. In fact the non-supply of a test report like in all previous 14 purchase orders did not affect the orders made as the product was duly supplied in accordance with the sample and description. The respondent also went on to pay the appellant in full without objection.

[46] Prestige had a reasonable opportunity to examine the product but had retained and used the product. Prestige must be deemed to have accepted the product that they bought.

[47] Prestige's claim was in relation to its breach of the RB contract to RBSB. However, there was never any incorporation of the RB contract into the PO.

[48] The restrictions of hazardous substances compliance was a term imposed by RBSB on Prestige under their contract and was never a term of the subject PO between Prestige and Clariant.

[49] Clariant was not responsible for any breach of the contract between RBSB and Prestige. The subject PO was not related to that contract. Clariant duly repudiated liability.

[50] Even if it was liable, Clariant position was that it was only liable to Prestige for the sum of RM3,980 which was the loss that naturally arose in the usual course of things from the breach of the subject PO.

Submissions by Prestige

[51] Prestige contended that the sole contractual document relevant to this case was the subject PO. Each purchase order between the parties constituted a separate and distinct contract. So, the terms or conditions stipulated in any previous purchase orders issued by Prestige to Clariant were not relevant.

[52] Prestige issued the subject PO by which it specifically ordered from Clariant a product which did not contain any hazardous substance. This was further emphasised by the fact that Prestige wanted a test report with each delivery.

[53] Clariant accepted the subject PO unconditionally and without any amendments. It was therefore under a contractual obligation to comply with the conditions stipulated in the subject PO, failing which it would be liable to Prestige.

[54] Prestige contended that Clariant failed to comply with the term that the product must not contain any hazardous substance.

[55] Under such circumstances, said Prestige, its receipt and usage of the product and payment for the product cannot amount to acceptance of the product or waiver of its contractual rights.

[56] Prestige asserted that Clariant knew Prestige was supplying the product to RBSB. Under such circumstances, Clariant need not be a party or privy to the contract between Prestige and RBSB; it was liable for all consequential losses suffered by Prestige as a result of its breach of contract.

[57] Prestige claimed that it had proven that it was Clariant's breach which had resulted in Prestige paying the compensation sum to RBSB and Prestige was entitled to be paid that same amount by Clariant.

OUR ANALYSIS

[58] The following facts are not disputed:

(a) a valid contract of sale was entered into by Prestige and Clariant under the subject PO;

(b) the subject PO was for the supply of that product described as 'PAJ4A741GM RED';

(c) the subject PO dated 7 August 2007 bears the note on hazardous substances;

(d) Clariant accepted the order in the subject PO in terms of the conditions stipulated by Prestige in the subject PO, which would include the condition in the note;

(e) four deliveries were made pursuant to the Subject PO, the first delivery being on 14 November 2007, and the last on 1 March 2008;

(f) Prestige received all four deliveries and stamped on the delivery notes that receipt of the deliveries did not constitute acceptance, and the deliveries were still to be subjected to inspection approval;

(g) no test report as stipulated in the subject PO was attached to any of the four deliveries;

(h) Prestige did not return any of the goods delivered pursuant to the subject PO; and

(i) Prestige did not at any time demand submission of the test results from Clariant.

A *Sale of Goods Act 1957*

Applicability

B **[59]** The subject PO is obviously an order for the product (the colourant identified as PAJ4A741GM RED) which must not contain any hazardous substance.

C **[60]** The contract for the sale (and purchase) of the product is a clearly a contract of the sale of goods within the meaning of sub-s 4(1) of the Sale of Goods Act 1957 ('Act 382') as it is a contract whereby the seller (Clariant) agrees to transfer the property in the goods (the product) to the buyer (Prestige) for a price.

D Sale by description

[61] In our view that sale pursuant to the subject PO is a sale by description within the meaning of s 15 of Act 382, which reads as follows:

E 15 Sale by description

Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the
F description.

[62] Even if the goods in question had been specified, there can still be a sale by description. In *Grant v Australia Knitting Mills Ltd and Others* [1936] AC 85, the Privy Council took the view that 'there is a sale by description even
G though the buyer is buying something displayed before him on the counter; a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, eg, woollen under-garments, a hot water bottle, a secondhand reaping machine, to select a
H few obvious illustrations'.

[63] In this case, the thing being purchased was the colourant identified as PAJ4A741GM RED, and which was further described as a product which must not contain any hazardous substance. There was therefore the implied
I condition that the goods (the product) to be supplied under the subject PO must comply with that description.

Was there a breach of the implied condition? A

[64] In this case, the product being sold and purchased was the specific product which both the seller (Clariant) and the buyer (Prestige) knew as PAJ4A741GM RED, which must also, in addition, not contain any hazardous substance. B

[65] As mentioned earlier, Clariant accepted the subject PO with the stipulated condition that the colourant specified as PAJ4A741GM RED must not contain any hazardous substance. C

[66] If, as argued by Clariant, the colourant PAJ4A741GM RED must of necessity contain the hazardous substance in order to produce the desired colour, it stands to reason that Clariant should not have accepted the order under the subject PO. Having accepted the subject PO, Prestige is entitled to assume that the colourant PAJ4A741GM RED could be produced without any hazardous substance. D

[67] The contention that Prestige had accepted 14 previous deliveries of PAJ4A741GM RED under previous purchase orders is misconceived as the previous purchase orders did not contain the condition that the product ordered must be free of any hazardous substance. E

[68] There is no doubt that what was delivered by Clariant did not meet the condition that the product must be free of any hazardous substance. There was therefore a clear breach of that condition of the subject PO. F

Waiver

[69] As stated earlier, Clariant delivered the product in four separate deliveries: on 14 November 2007, 5 January 2008, 1 February 2008 and 1 March 2008. No test report was attached to any of the deliveries. The deliveries were accepted by Prestige subject to the qualification stamped on the delivery notes that the deliveries were still to be subjected to inspection approval. G H

[70] There was a gap of 52 days between the first delivery and the second delivery. There was more than sufficient time for Prestige to examine/inspect the product delivered, or at the very least to insist on the test report for that delivery. Not only did Prestige not do so, it in fact paid for that first delivery. It did so on 29 February 2008. I

[71] There was a gap of between three weeks and one month between subsequent deliveries. Certainly more than sufficient time for

examination/inspection of the product delivered. Again, Prestige did not ask for the test report. It accepted the deliveries and paid for them. The last payment being on 10 June 2008.

[72] It must be remembered that the subject PO came with two conditions: that a test report be attached to every delivery, and that the product and packaging supplied must not contain any hazardous substance.

[73] As we understand it, the importance of the test report lies in the fact that it would disclose the true nature of the product supplied in each delivery of the product ordered under the subject PO and thus should have been able to indicate the presence or absence of hazardous material in the particular shipment of the product.

[74] Not only did Prestige not reject the product supplied by Clariant, Prestige claimed to have used the product in its own product and supplied the latter to a third party.

[75] There is no question that property in the goods (product) had passed to Prestige.

[76] In those circumstances, does Prestige have any remedy as against Clariant?

Remedy

[77] Section 13 of Act 382 makes provision for situations where the buyer had accepted the goods. That section reads as follows:

> 13 When condition to be treated as warranty
>
> (1) Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.
>
> (2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract express or implied to that effect.
>
> (3) Nothing in this section shall affect the case of any condition or warranty the fulfilment of which is excused by law by reason of impossibility or otherwise.

[78] In this case, Prestige accepted the products, incorporated it into the plastic parts it manufactured and sold those parts RSB. In our considered view, the breach of the condition is to be treated as a breach of warranty.

[79] Section 59 of Act 382allows a buyer to sue for damages for breach of warranty. It provides as follows:

> 59 Remedy for breach of warranty
>
> (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may —
>
> (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
>
> (b) sue the seller for damages for breach of warranty.
>
> (2) The fact that a buyer has set up a breach of warranty in diminution of the price does not prevent him suing for the same breach of warranty if he has suffered further damage.

[80] In this case, Prestige is 'compelled' by s 13 to treat the breach by Clariant as a breach of warranty and therefore is entitled to sue Clariant for damages.

Damages

[81] Prestige claimed the sum of RM3,196,841.71, being the compensation sum it claimed to have paid under its settlement with RBSB due to product supplied by Clariant under the subject PO being found to contain hazardous substances, and for damages to be assessed.

[82] The Court of Appeal allowed the claim for RM3,196,841.71. The basis for that amount being granted appear in the paragraphs quoted below:

> Proof of damages
>
> [29] On perusal of the evidence adduced, we are of the opinion that the plaintiff had adduced sufficient documentary and oral evidence to prove its damages. Reference is made to exh P11, which shows the breakdown of the total sum of damages claimed by the plaintiff in the sum of RM3,196,841.71.
>
> [30] The documents pertaining to rework costs appear as exh 43 (pp 759–766 *RR Jld* 5). Invoices relating to freight charges appear as exhs P44 and P45 (pp 770–851 and 852–888). Legal fees incurred in European countries is shown in p 767 *RR Jld* 5.
>
> [31] The plaintiff's witnesses, PW2, PW4 and PW6 had verified the claims from Robert Bosch and the amount claimed by the plaintiff from the defendant.

[83] Neither s 59 of Act 382 nor any other provision of that Act has the equivalent of sub-s 53(2) of the English Sale of Goods Act 1893 after which it is modelled. That subsection provides that 'The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty'. In the circumstances, the applicable statutory provision is s 74 of the Contracts Act 1950, which continues to apply to contracts for sale of goods by virtue of s 3 of Act 382 'in so far as they are not inconsistent with the express provisions of this Act'.

[84] The relevant provisions of s 74 of the Contracts Act 1950 are as follows:

> 74(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[85] In the context of the case before us, there was nothing to negate the evidence that the sum of RM3,196,841.71 was paid by Prestige under its settlement with RBSB.

[86] The pertinent question to be asked is whether that sum paid to RBSB is a loss to Prestige that 'naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach'? Or was the payment/loss 'a remote and indirect loss'?

[87] The pleaded case of Prestige is that the breach by Clariant is in respect of the subject PO which imposed a condition that the product to be supplied must not contain hazardous subsances.

[88] As mentioned above the Prestige's case was that on 15 October 2007 the Swedish Chemical Agency inspected a part in a tool sold by RBAB and found that the tool contained plastic part which contained a chemical which was in breach of the EU Directive. That tool was supplied by RBSB and the plasctic part was supplied by Prestige with the colourant supplied by Clariant as one of its components.

[89] It must be noted that the first 'instalment' of the masterbatch/colourant ordered under the subject PO was only delivered on 14 November 2007. This was 29 days BEFORE the inspection by the Swedish Chemical Agency. The tools inspected by the Swedish authorities could not possibly therefore have contained the product supplied by Clariant under the subject PO.

[90] However, our examination of the oral and documentary evidence in the record of appeal shows that the report of the Swedish Chemical Agency triggered the inspection, quarantine, return and and reworking of the products containing the colourant supplied by Clariant under the subject PO.

[91] That the sole cause for the remedial and preventive measures that RBSB had to take was the colourant supplied by Clariant was not in dispute. We note that Clariant's position was not that it did not supply the product containing the hazardous substance, but that Prestige (and RBSB) knew all along that the product contained the substance, and that it did not have knowledge that the product would be used in goods to be sold in the European Union countries.

[92] We are satisfied that Clariant knew that the product would be used in parts to be produced by Prestige and those parts would be supplied to third parties to be incorporated in products produced by the third parties. Clariant was surely aware that if a breach of the condition of its contract with Prestige causes a loss to Prestige it would also in the usual course of things naturally cause a loss to the third parties. In this case, the third party concerned was RBSB.

[93] We are satisfied that the payment that Prestige had to make to RBSB to compensate RBSB for those measures that RBSB had to take had been amply proved, in particular, through the evidence of PW4 and PW6, who were the employees of RBSB with knowledge of the payments. Their evidence was largely unchallenged.

[94] There was more than sufficient oral and documentary evidence to prove that the compensation was paid to compensate RBSB in relation to the plastic parts supplied by Prestige using the product supplied under the subject PO.

[95] In the circumstances, we found no basis to disagree with the Court of Appeal that Prestige had proved the amount it claimed as the compensation sum it had to pay and had paid to RBSB due to Clariant's breach of the subject PO.

Leave question

[96] We are of the considered view that in the circumstances of this case, which involves essentially issues of facts, the leave question need not be answered.

A DECISION

[97] This appeal is dismissed with costs.

B **[98]** Finally, we wish to state that this judgement is delivered pursuant to s 78 of the Courts of Judicature Act 1964 as our brother, Jeffrey Tan FCJ, has retired.

Appeal unanimously dismissed; COA's decision affirmed.

C Reported by Ashok Kumar

D

E

F

G

H

I